United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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74-2615

To be argued by
GEOFFREY M. KALMUS

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P/S

United States Court of Appeals
SECOND CIRCUIT

MAURICE GOLDBERG, CLAIRE GOLDBERG, MAURICE GOLDBERG, as Custodian for Marion Goldberg, BETTE GOLDBERG and JOYCE E. GOLDBERG, under The New York Uniform Gifts to Minors Act, and MAURICE GOLDBERG, HENRY J. GOLDBERG and SAMUEL M. SPRAFKIN, as Trustees under the Trusts for the benefit of Marion Goldberg, Bette Goldberg and Joyce E. Goldberg,

Plaintiffs-Appellants,

against

ARROW ELECTRONICS, INC.,

Defendant-Appellee,

and

STATE OF NEW YORK,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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Preliminary Statement

Plaintiffs, Maurice Goldberg, members of his family, and trusts of which they are beneficiaries (collectively the "Goldbergs"), appeal from a judgment of the District Court for the Eastern District of New York dismissing

their complaint for failure to state a claim upon which relief can be granted. The Goldbergs' complaint, predicated upon 42 U.S.C. §1983, sought (i) monetary damages against Arrow Electronics, Inc. ("Arrow"), and (ii) a declaratory judgment that New York Business Corporation Law §623 ("BCL §623") is unconstitutional, as applied to corporate shareholders who, like plaintiffs, elect to dissent from a merger, but fail to obtain an appraisal and payment for their shares because the proposed merger is abandoned prior to consummation.

Upon Arrow's motion to dismiss the complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, for summary judgment, Chief Judge Mishler ruled (178a-186a)* that Arrow's reliance upon BCL §623 did not constitute "state action" for purposes of §1983 and, hence, that the complaint failed to state a claim for relief. In addition, he found that BCL §623 was plainly constitutional, as applied to plaintiffs, for, upon Arrow's abandonment of the proposed merger from which the Goldbergs had dissented, the statute restored them to their full rights as shareholders.

On this appeal, plaintiffs challenge the District Court's findings of an absence of state action and again urge the unconstitutionality of BCL §623; Arrow, on the other hand, asserts the correctness of the decision below, both as to the inapplicability of §1983 and as to the constitutionality of BCL §623. Moreover, we show, as we argued before Judge Mishler, that principles of *res judicata* bar the plaintiffs from relitigating in federal court precisely the same claims that they unsuccessfully asserted in prior litigation in the New York state courts.

* Page references are to the appendix filed by plaintiffs-appellants.

Questions Presented

1. Does a complaint premised on 42 U.S.C. §1983 allege a deprivation of rights "under color of law," when the conduct of the defendant--a private corporation—was only its exercise of its statutory right (i) to condition an offer to pay a dissenting shareholder for his stock upon the actual consummation of the corporate action from which he dissented, and (ii) to abandon the proposed corporate action, thus depriving the dissenter of his appraisal rights but restoring him to his status as a shareholder?

2. Does *res judicata* bar a plaintiff from relitigating in federal court, in an action brought pursuant to 42 U.S.C. §1983, claims identical to those raised in prior state court proceedings and decided adversely to the plaintiffs?

3. Is a shareholder deprived of procedural due process by a statutory scheme which becomes operative not merely on notice to him but at his instance, and which provides for a full judicial hearing of all legal and equitable claims?

4. Is a shareholder deprived of substantive due process by a statutory scheme that provides that, (i) upon his voluntary election to dissent from a proposed corporate action, he exchanges his shareholder rights for appraisal rights, but that, (ii) if the proposed corporate action is abandoned, he is restored to his full rights as a shareholder?

Facts

(a) The proposed merger

Arrow is a New York corporation engaged in the distribution and sale of electrical and electronic parts and in other businesses. Its common stock is listed and traded on the American Stock Exchange (86a).

Plaintiff Maurice Goldberg, who at one time was president of Arrow, together with the other plaintiffs who are members of his family and family trusts (the "Goldbergs"), in the aggregate own approximately 75,000 shares out of the 1,500,000 shares of Arrow common stock outstanding (86a).

In the spring of 1972 the management of Arrow proposed to its stockholders that Arrow change its state of incorporation from New York to Delaware through its merger into a newly-created, wholly owned Delaware subsidiary of the same name. The merger agreement provided for its abandonment by Arrow or by the Delaware subsidiary— even after stockholder approval—at any time prior to its effective date, which was defined as the date that the merger agreement was filed with the Secretary of State of Delaware (86a-87a).

The proposed merger would have had no material effect on Arrow's business (87a). It would simply have given the company the benefit of more liberal provisions of Delaware law applicable to corporations (23a). The merger was approved overwhelmingly by Arrow's shareholders at its May 25, 1972 annual meeting. However, the Goldbergs, alone among the some 1,500 shareholders of Arrow at the time, objected to the merger and filed a notice of election to invoke the appraisal rights accorded dissenting shareholders (23a, 88a).

(b) BCL §623

BCL §623 is a comprehensive statutory scheme governing the rights of shareholders of New York corporations who dissent from important corporate actions, such as mergers. It affords to dissenting shareholders who file timely objections and timely elections the right to payment of the fair value of their shares as of the day before approval of the

corporate action by shareholders (BCL §623(h)(4))—but only if the transaction from which the dissent was taken is actually consummated. If the corporation and the dissenting shareholders are unable to reach agreement on fair value, it may be fixed in a special proceeding in the Supreme Court brought by either the corporation or the dissenters (BCL §623 (h)(1) and (2)). If the court enters a final order awarding the dissenters payment for their shares, the order must, subject to limited exceptions, include an award of interest from the date the shareholders authorized the action (the "shareholder authorization date") to the date of payment and may also include the costs and expenses of the special proceeding (BCL §623 (h)(6) and (7)). The court has discretion, again in the case of a final order, also to award the dissenters counsel fees (§623 (h)(7)).

Although it was seriously considering abandoning the merger in light of the Goldbergs' dissent, Arrow duly made an offer to purchase the Goldbergs' stock at a price of $9 per share, conditioning the offer, as §623 expressly permits, on consummation of the merger (25a).

(c) The Goldbergs' first state application

The Goldbergs did not agree to Arrow's conditional offer of $9 per share. Rather, on October 12, 1972, they started a special proceeding in the New York Supreme Court pursuant to BCL §623 to determine the value of their shares (25a). The petition (61a-67a) sought an order directing payment to the Goldbergs for the value of their shares, as fixed by the court, together with the costs and expenses of the proceeding.

Arrow opposed the petition, citing the clear wording of the statute that no payment for the Goldbergs' shares was appropriate unless and until the merger was actually consummated. In its opposing affidavit (85a-90a), Arrow

explained to the court that it was considering abandoning the merger because of the burden upon Arrow's financial resources which payment for the Goldbergs' shares, even at the $9 offer price, would impose (88a-90a).

On January 4, 1973, Justice Murtagh denied the Goldbergs' application. In his opinion (92a-93a) Justice Murtagh pointed out that Arrow was "seriously considering abandoning" the merger and construed BCL §623 as follows:

> If the proposed action is abandoned or rescinded, the shareholders will not have the right to receive payment for their shares.

Justice Murtagh's order was without prejudice to a renewal of the petition if either the merger was consummated or Arrow delayed beyond a reasonable time in determining whether or not to go forward with the merger (92a).

(d) Arrow abandons the merger

On January 31, 1973 Arrow's board of directors adopted a resolution formally abandoning the planned merger (26a). The Goldbergs' counsel was informed of the decision to abandon the merger by letter of February 2, 1973 (26a). The decision to abandon the merger, by the express terms of BCL §623(e), "reinstated" the Goldbergs "to all [their] . . . rights as . . . shareholder[s] as of the filing of [their] . . . notice of election."*

Contrary to the repeated assertions in the Goldbergs' statement of facts, in none of its acts summarized above was Arrow engaged in any diabolically motivated "heads I win, tails you lose" game. Rather, as Mr. Waddell, Arrow's secretary and treasurer, stated in his affidavit submitted to

* The Goldbergs' stock certificates, which had been endorsed with a legend reciting their notice of election at the time they dissented, were replaced by unlegended certificates.

Justice Murtagh (85a-90a), Arrow, hoping to fulfill the desires of its shareholders to effectuate the Delaware merger, was, throughout the period between the date of the Goldbergs' election to dissent and Arrow's abandonment, engaged in an effort to renegotiate its loan agreements to enable it to pay for the Goldbergs' stock (89a). As soon as Arrow was certain that this was not feasible, consistent with the other cash needs of the business, the merger plan was abandoned and the Goldbergs were restored to their full shareholders' rights (26a-27a).

(e) The Goldbergs' second state application for interest and expenses

The Goldbergs were not satisfied. On February 12, 1973, they moved for an order adjudicating that the merger had been abandoned (94a)—an idle request since Arrow had so announced—and awarding them $52,068.69 "for their costs, expenses and damages, inclusive of counsel fees." The moving affidavits in support of this motion (96a-119a) further articulated the claim as one for, in addition to costs and expenses, either "damages" or interest on the value of the Goldbergs' shares from the shareholders' authorization date to the date the merger was abandoned. No claim was made for payment by Arrow for the shares themselves.

The Goldbergs premised their motion primarily on the grounds of "simple justice" and "equity," seemingly recognizing that BCL §623 afforded them no further relief after abandonment of the merger (28a). Their papers thus were full of talk of bad faith on Arrow's part and of the dictates of fairness. Conspicuously absent was any claim that BCL §623, as interpreted by Justice Murtagh to preclude the award of relief to dissenting shareholders upon abandonment of the merger, was unconstitutional (28a).

In opposition to the motion we documented Arrow's good faith and pointed out that there was no statutory authority for any of the relief sought by the plaintiffs nor any equitable reason why it should be awarded (120a-130a).

On March 28, 1973, Justice Chimera ruled on the motion (138a-141a). He held that there was no basis for the award of the interest or damages sought by the Goldbergs under BCL §623, no showing of bad faith on Arrow's part, and hence no equitable ground for any award of damages (139a-140a). However, he ruled that the Goldbergs were entitled to counsel fees, in an amount to be set by a referee, finding authority for such relief in BCL §623(h)(7) (140a).

(f) The appeals to the Appellate Division

The Goldbergs and Arrow each appealed from the portions of Justice Chimera's order adverse to them. Moreover, the Goldbergs had previously noticed an appeal from Justice Murtagh's decision denying their original petition as premature. In their briefs, both as appellants and appellees, the Goldbergs, relying solely on state law and equitable grounds, again made no claim that BCL §623 was unconstitutional (i) as interpreted by Justice Murtagh to deny them payment for their shares; (ii) as interpreted by Justice Chimera to deny them all other relief except counsel fees; or (iii) as argued by Arrow on its cross-appeal with respect to the allowance of counsel fees (29a).

All of the appeals were decided by the Appellate Division on September 20, 1973 (142a-147a). The court sustained Arrow's position in all respects. It affirmed Justice Murtagh's ruling (including his finding that Arrow had proceeded in timely fashion (145a)); affirmed that portion of Justice Chimera's order denying petitioners' motion for expenses and interest or damages; and reversed Justice Chimera's award of counsel fees to the Goldbergs, finding

no authorization for such an award in BCL §623(h)(7) (145a-147a).

(g) The Goldbergs raise their constitutional theory

On October 18, 1973, the Goldbergs appealed as of right to the Court of Appeals from the Appellate Division's orders of September 20, asserting for the first time their claim that BCL §623, "as construed by the Appellate Division, is unconstitutional" (148a). While this constitutional claim satisfied one requirement under CPLR §5601 for an appeal as of right, the Goldbergs overlooked another requirement—that the order appealed from be one that "finally determines an action." CPLR §5601(b)(1). Thus, on the motion of Arrow, the Court of Appeals dismissed the appeal for lack of jurisdiction (151a).

Because of their procedural error, the Goldbergs did not succeed in securing a hearing on the merits of their constitutional claim until February 22, 1974, when they moved in the Appellate Division for reconsideration of its orders of September 20, or, in the alternative, for leave to appeal to the Court of Appeals. In their affidavit (154a-158a) and memorandum of law in support of the motion the Goldbergs posed and briefed the very same constitutional claim they advance here. For example, their moving affidavit stated:

> We respectfully submit that the appraisal statute (BCL §623) is unconstitutional because: Upon abandonment of the merger during the judicial appraisal proceeding, the statute deprives [dissenting shareholders] of their right to receive payment of the value of their shares. Further, upon reinstatement to shareholder status, the [dissenting shareholders] were not restored to the position they were in 8 months earlier, their shares having declined in value, and during the 8 months they had been deprived of their property. All this was done without due process (156a).

Thus, the Goldbergs' constitutional theory was developed, as fully as its dubious nature permitted, in the papers submitted to the Appellate Division.

(h) The state courts reject the constitutional theory

In response, Arrow argued that (i) the motion for reconsideration was untimely, and (ii) as to that portion of the motion seeking leave to appeal, the constitutional claim raised was without merit. On March 21, 1974, the Appellate Division denied, without opinion, both the motion for reargument and that seeking leave to appeal (34a).

The Goldbergs next sought leave to appeal to the Court of Appeals from that court itself (170a). Again they raised and fully briefed their constitutional theory of recovery, noting that the Appellate Division "presumably" had rejected it in denying leave to appeal (34a, 172a-176a). The Court of Appeals found no more merit in the theory than had the Appellate Division and, on May 1, 1974, denied leave to appeal (177a).

The Goldbergs did not, as they could have, seek review of the decision in the United States Supreme Court. Instead, they commenced this action under 42 U.S.C. §1983.

Argument

I

The District Court properly dismissed the Goldbergs' complaint for failure to state a claim against Arrow under 42 U.S.C. §1983, since Arrow did not act under color of state law.

As plaintiffs recognize, a claim for relief under 42 U.S.C. §1983 must be predicated upon a deprivation of constitutional rights effected by the defendant "under color of state law." *E.g., Moose Lodge No. 107* v. *Irvis,* 407 U.S.

163 (1972). To satisfy the color-of-law test a litigant must show that the state or its agents participated in, or in some manner encouraged, the allegedly unconstitutional conduct. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144 (1970).

Both in the court below and in their brief here, the Goldbergs argue that the mere enactment by the legislature of BCL §623, permitting a corporation to abandon a proposed merger without compensation to dissenting shareholders, constitutes such state encouragement of a private deprivation of rights as to amount to state action under §1983. They argue that Judge Mishler erred in his reliance upon this Court's decision in *Shirley* v. *State National Bank of Connecticut*, 493 F.2d 739 (1974), since the statute there in issue merely codified the common law, while BCL §623 alters New York's common law requirement of unanimous shareholder consent to certain types of corporate transactions.* The applicable precedent, plaintiffs' say, is not *Shirley* but *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), in which the Supreme Court found state action in the acts of individuals pursuant to a California constitutional amendment that fostered and actively encouraged racial discrimination in housing.

Plaintiffs' contention that §1983 may be invoked upon a mechanical determination that a state statute in some particular modifies common law rights rather than merely confirming them is far too simplistic. As the Supreme Court stated more than a decade ago, the inquiry as to the applicability of §1983 requires a "sifting [of] facts and weighing [of] circumstances" to determine the degree of

* In *Shirley*, Judge Mulligan wrote that a corporation's acts pursuant to a statute providing for self-help repossession did not involve state action and rejected "the proposition that the mere fact that the state has legislated in the area of peaceful repossession constitutes sufficient participation to be appropriately denominated 'state action.'" 493 F.2d at 743.

significance of the state's involvement. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 722 (1961).

Judge Mishler pursued that inquiry here and concluded that BCL §623, as applied to the facts at hand, did not have any "significant bearing" on the Goldbergs' rights as shareholders.* After analyzing the statutory scheme in detail, he ruled that the Goldbergs had failed to demonstrate any "greater degree of state involvement in the activity plaintiffs complaint [sic] of here than existed in *Shirley.*"

Decisions handed down since Judge Mishler's ruling last November serve to confirm the soundness of his analysis and to emphasize the absence of state action—for purposes of §1983—in circumstances like those at hand.

The Supreme Court's decision in *Jackson* v. *Metropolitan Edison Co.,* 43 U.S.L.W. 4110 (December 23, 1974), is particularly apt. In *Jackson,* plaintiff, suing under §1983, sought relief against a privately owned and operated utility, contending that its termination of her electrical service without prior notice and an opportunity to be heard, denied her due process. The Court ruled that, though the termination of service was pursuant to a tariff filed by the utility in accordance with state law, no state action was present. In reaching this result the Court did not concern itself with the manner in which the state's statutory scheme departed from the common law, but rather focused upon the significance of the state's involvement in the acts of the private utility. Justice Rehnquist wrote:

> "Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from

* As Judge Mishler pointed out, "[u]nder common law, if the plaintiffs opposed the merger, the merger would be precluded, and plaintiffs would remain as regular shareholders. Here, plaintiffs also opposed the merger and have also been returned to their status as shareholders. Thus, their position now is virtually the same as it would have been under the common law."

> the State does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment.
>
> * * * * *
>
> "All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated private utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utilities Commission found permissible under state law. Under our decisions this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for the purposes of the Fourteenth Amendment." 43 U.S.L.W. at 4114 (footnotes omitted).

A recent, carefully reasoned District Court opinion is also squarely in point. In *Parks* v. *"Mr. Ford"*, slip opinion No 72-639 (E.D. Pa. December 11, 1974), the owner of an automobile sued a garage, charging that the defendant wrongfully retained and sold his car pursuant to Pennsylvania's repair man's lien law. Unlike the self-help repossession statute involved in *Shirley* v. *State National Bank of Connecticut, supra,* the Pennsylvania statute indisputedly afforded remedies beyond those available to creditors at common law.

Relying upon *Reitman* v. *Mulkey, supra,* plaintiffs argued that "the state, by sanctioning private detention and sale, thereby engaged in an affirmative program of fostering, authorizing and encouraging the practice to such a degree as to equate the acts of individuals with the acts of the commonwealth itself." In concluding that, despite the legislature's statutory modifications of the common law, no state action was present, Judge Fogel first rejected the assumption that *Reitman* v. *Mulkey* is applicable to enactments

other than those involving alleged encouragement of racial discrimination.*

Noting, however, that at least some of the self-help repossession cases, *e.g., Gibbs* v. *Titelman*, 502 F.2d 1107 (3rd Cir. 1974), had implied that the crucial distinction between the constitutional provision in *Reitman* and other legislative acts was that the former went beyond the common law while the latter did not, Judge Fogel went on to reject any such simplistic test for invoking § 1983. He reasoned:

> "The fact that the law under attack is new and creates, rather than codifies, common law rights should not change the inquiry. The focus for state action purposes should always be on the impact of the law on private orderings, not the law's age or historical underpinnings. Unless the law in some fashion significantly interferes with private ordering, the challenged conduct should not be attributed to the state. To make state action turn upon whether the statutory right being asserted has common law origins would lead to anomalous results. The identical private conduct pursuant to the identical state statutory law, would be state action in some states while not in others depending solely upon the fortuitous and unimportant circumstance of the age of the law. . . .
>
> "In essence, plaintiffs would have us hold that the mere existence of the challenged case and statutory law in a controversy which does not involve racial discrimination, constitutes such authorization, fosterage, and encouragement that subsequent conduct by individuals in conformity with the law amounts to state action. We cannot accept this contention, and find no support for it in *Reitman* v. *Mulkey*. Carried to its logical conclusion, such an argument would transform any conduct which is permitted by

*This Court has similarly limited the *Reitman* decision to circumstances involving racial discrimination. *E.g. Jackson* v. *Statler Foundation*, 496 F.2d 623 (1974); *Lefcourt* v. *Legal Aid Society*, 445 F.2d 1150 (1971).

> state law—or indeed, any conduct which is not expressly prohibited—into state action for Fourteenth Amendment purposes. Indeed, plaintiffs' position could produce the ironic result of limiting private action only to those individual acts which are contrary to state law. It could only result in compelling states to prohibit to its citizens the right to undertake any acts which the state itself could not constitutionally undertake, a result which would completely destroy the distinction between private conduct and state action."

Accord, James v. *Pinnix,* 495 F.2d 206 (5th Cir. 1974); see *Bond* v. *Dentzer,* 494 F.2d 302 (2d Cir.), *cert. denied,* 42 L. Ed. 2d 63 (1974).

If, as the courts held, no state action was present in the *Jackson, Parks,* or *James* cases, *a fortiori* there was none in the case at hand. Unlike the utility in *Jackson,* Arrow is not subject to a pervasive regulatory scheme of the sort that governs electric companies; rather, New York's involvement in Arrow's activities differs not at all from the state's role in the affairs of any profit-making corporation that it charters. Moreover, unlike the circumstances in all of the cases we have cited and in all of those relied upon by plaintiffs here, it is not the defendant who sought the benefit of the statutory scheme about which plaintiffs now complain, but plaintiffs themselves, who first chose to dissent and then elected to bring suit to enforce their dissenters' rights. In these circumstances, it verges upon the frivolous to argue that Arrow's actions pursuant to BCL §623 constitute state action.

II

Res judicata bars the plaintiffs from maintaining this action.

One of the grounds upon which Arrow sought summary judgment in the District Court was the bar imposed by the prior state court proceedings brought by plaintiffs upon relitigation of the very same claims. Although Judge Mishler did not pass upon our defense of *res judicata,* it is clear that this doctrine proscribes the Goldbergs' present suit.

It is, of course, well established that *res judicata* bars a party from asserting a cause of action identical in substance to one already adjudicated against it, both as to the issues actually litigated in the prior action and as to those which could previously have been litigated. *E.g., Schuylkill Fuel Corp.* v. *B. & C. Nieberg Realty Corp.,* 250 N.Y. 304, 306-07 (1929). This bar operates fully, whether the non-litigated issues are of constitutional dimension, *American Surety Co.* v. *Baldwin,* 287 U.S. 156 (1932), or whether the second suit is brought in a state or federal court. *Grubb* v. *Public Utilities Commission,* 281 U.S. 470, 479 (1930).

This Court, as well as others, have applied these principles to claims of unconstitutionality founded upon 42 U.S.C. §1983 as fully and unhesitatingly as to other constitutional challenges. *E.g., Lackawanna Police Benevolent Ass'n* v. *Balen,* 446 F.2d 52 (2d Cir. 1971); *Roy* v. *Jones,* 484 F.2d 96, 98-99 (3d Cir. 1973); *Bricker* v. *Crane,* 468 F.2d 1228 (1st Cir. 1972), *cert. denied,* 410 U.S. 930 (1973); *Howe* v. *Brouse,* 422 F.2d 347 (8th Cir. 1970); *Deane Hill Country Club Inc.* v. *City of Knoxville,* 379 F.2d 321 (6th Cir.), *cert. denied,* 389 U.S. 975 (1967); *Jenson* v. *Olson,* 353 F.2d 825 (8th Cir. 1965); *Rhodes* v. *Meyer,* 334 F.2d 709 (8th

Cir.), *cert. denied,* 379 U.S. 915 (1964); *Goss* v. *Illinois,* 312 F.2d 257 (7th Cir. 1963).

Moreover, in *Preiser* v. *Rodriguez,* 411 U.S. 475, 497 (1973), the Supreme Court, in deciding the circumstances under which a petitioner alleging a deprivation of civil rights may proceed under §1983, rather than by writ of *habeas corpus,* noted that one difference between the two routes was that "*res judicata* has been held to be fully applicable to a civil rights action brought under section 1983."

Before Judge Mishler the Goldbergs neither took issue with these precedents nor denied that the claim they are asserting against Arrow in the federal court is identical in substance to that alleged in their earlier state action. Rather they argued that this Court's recent opinion in *Lombard* v. *Board of Education,* 502 F.2d 631 (1974), *petition for cert. filed,* 43 U.S.L.W. 3457 (U.S. January 15, 1975) (No. 74-941), compelled the rejection of Arrow's *res judicata* defense. Plaintiffs asserted, in effect, that *Lombard*—though factually a world away from the case at hand—exempted from the usual rules of *res judicata* all suits brought under §1983 in which the federal constitutional issue could have been litigated in the prior state proceeding, but, in fact, was not.*

As we demonstrate below, *Lombard* is a narrow ruling and cannot properly be read so broadly as to authorize relitigation of the plaintiffs' claim in this suit.

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* In *Lombard,* a young school teacher denied tenure by the New York City Board of Education on grounds impugning his moral integrity failed to raise certain procedural due process claims in state court proceedings contesting the denial. This Court held that *res judicata* did not bar the teacher from advancing these claims in a subsequent §1983 suit.

(a) Plaintiffs' misreading of *Lombard* unduly expands its reach

To read Judge Gurfein's decision in *Lombard* in the sweeping fashion for which plaintiffs contend one must suppose that the Court intended to reject or overrule—without even a passing mention—a number of other recent decisions of the Second Circuit, of the Supreme Court, and of several other courts of appeals. These prior cases uniformly held that *res judicata* was "wholly applicable" to §1983 actions, including those in which the constitutional issues presented could have been, but were not, litigated in the prior state court suits.

Thus in *Taylor* v. *New York City Transit Authority,* 433 F.2d 665 (2d Cir. 1970), the plaintiff failed to present the constitutional claims available to him in appealing to the City Civil Service Commission from his discharge by the Transit Authority. In a subsequent Article 78 proceeding the state courts refused to hear the constitutional claim; nonetheless, in an ensuing suit under §1983 this Court held that *res judicata* barred relitigation of the constitutional issue. Again, in *Thistlethwaite* v. *City of New York,* 497 F.2d 339 (2d Cir.), *cert. denied,* 43 U.S.L.W. 3359 (U.S. December 23, 1974) (No. 74-524), the Court found that principles of *res judicata* precluded a §1983 challenge to a rule of the City's Parks, Recreation and Cultural Affairs Department, even though the constitutional issue sought to be raised differed from that asserted in a prior state court suit.

Similar conclusions were reached in other circuits in decisions antedating *Lombard, e.g., Lovely* v. *Laliberte,* 498 F.2d 1261 (1st Cir.), *cert. denied,* 42 L. Ed. 2d 316 (1974); *Francisco Enterprises, Inc.* v. *Kirby,* 482 F.2d 481 (9th Cir. 1973), *cert. denied,* 415 U.S. 916 (1974); *Coogan* v. *Cincinnati Bar Association,* 431 F.2d 1209 (6th

Cir. 1970); *Frazier* v. *East Baton Rouge Parish School Board,* 363 F.2d 861 (5th Cir. 1966).

Finally, the Supreme Court, in a decision preceding *Lombard*—but not there discussed—approved the strict application of *res judicata* to §1983 actions involving constitutional claims which could have been, but were not, in fact, litigated in prior state proceedings. *Mertes* v. *Mertes,* 350 F. Supp. 472 (D. Del. 1972), *aff'd mem.,* 411 U.S. 961 (1973).

The *Mertes* case is particularly instructive because the history of the action—specifically the manner in which plaintiff sought to raise his constitutional claims—closely parallels that here. The plaintiff in *Mertes* initially participated in a hearing in Superior Court pursuant to a Delaware statute setting forth procedures governing the division of property following a divorce. Dissatisfied with the disposition of the Superior Court directing him to transfer portions of his real and personal property to his former wife, plaintiff appealed to the Delaware Supreme Court, for the first time raising the claim that the statute violated the due process and equal protection clauses of the Fourteenth Amendment. The Delaware Supreme Court refused to consider the constitutional question, because the issue had not been raised in the court below.

Plaintiff then commenced a §1983 action in federal court, again asserting that the state statute was unconstitutional. A three-judge court held that *res judicata* barred it from reaching the merits of the constitutional claim, since plaintiff could have raised this claim in the Superior Court:

> "It is well settled that where parties have been afforded an opportunity to participate fully in litigation, a prior final judgment rendered in an action by a state court . . . will operate as a bar to a subsequent adjudication of the same claim in a federal court not only as to every matter which was offered

> and received to sustain or defeat the claim, but also as to every other matter which could have been litigated and determined in that action. [citations omitted] The fact that the constitutional claim raised here was not considered by the Delaware Supreme Court because of [plaintiff's] procedural default in failing to raise the issue in the lower state court does not make the doctrine inapplicable. . . . It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the state [including a federal district court]." 350 F. Supp. at 474 (footnotes omitted).

The Supreme Court affirmed this ruling without opinion, 411 U.S. 961 (1973).

(b) Lombard, *stare decisis*, and the present action

As the above discussion demonstrates, until *Lombard*, this Court, virtually every other court of appeals that considered the question, and the Supreme Court as well, had applied the usual principles of *res judicata* to actions brought under §1983, even when the constitutional question was one which could have been, but was not, litigated in the prior state proceeding.

Surely, the opinion in *Lombard* was not intended to cast aside this recent, well-established body of decisional law without even a mention of the many authorities that we have cited above. Rather, Judge Gurfein's opinion, as we read it, created only a narrow exception to the general rules of *res judicata* applicable to §1983 actions when certain special circumstances—quite unlike those here—were present.

As the Court's opinion suggests, before the exception formulated in *Lombard* may be invoked, a plaintiff must show, at a minimum, (i) that the constitutional issue he seeks to raise in the §1983 suit was not raised in the state court *at all;* and (ii) that the constitutional issue involves a clear and substantial deprivation of procedural due process.*

Neither of these threshold criteria is met by plaintiffs in the present action.

(i) The Goldbergs raised their constitutional claim in the state courts

As noted earlier, the Goldbergs, in moving in the Appellate Division for reargument, or, in the alternative, for leave to appeal to the New York Court of Appeals, specifically challenged the constitutionality of BCL §623 as applied by the Appellate Division. When their motion was denied without opinion, plaintiffs sought leave from the Court of Appeals to appeal to that court and again raised and fully briefed their constitutional theory, stating that the Appellate Division, in denying leave to appeal, had "presumably" rejected it. Thus, both the Appellate Division, in adhering to its decision on the merits, and the Court of Appeals, in denying leave to appeal, had before them extensive briefs on the constitutional claim now pressed by plaintiffs in this forum; the *Lombard* plaintiff's constitutional claim, in contrast, was never raised or considered in the state courts at all.

The mere fact that the New York courts did not, in so many words, recite that they were rejecting the Goldbergs'

* Judge Gurfein's opinion thus distinguishes *Lombard* from *Frazier* v. *East Baton Rouge School Board*, 363 F.2d 861 (5th Cir. 1966)—the only one of the relevant precedents that *Lombard* discusses—on the grounds that the *Frazier* plaintiff, unlike *Lombard*, had a " 'full hearing' in the state court and procedural due process was not involved." 502 F.2d at 636.

constitutional contention does not, of course, detract from the bar of the state judgment. *Grubb* v. *Public Utilities Commission,* 281 U.S. 470, 477-78 (1930); *Roy* v. *Jones,* 484 F.2d 96, 98-99 (3rd Cir. 1973); *Kaufman* v. *Somers Board of Education,* 368 F. Supp. 28, 32-33 (D. Conn. 1973).

(ii) Plaintiffs' claimed denial of procedural due process is not even colorable and does not meet the *Lombard* standard for justifying a departure from settled principles of *res judicata.*

In addition to its insistence that a plaintiff proceeding under §1983 not have raised his constitutional claim in the prior state litigation, the *Lombard* court imposed a second threshold requirement to avoidance of the application of *res judicata.* That requirement was that the plaintiff's §1983 claim must involve a serious deprivation of procedural due process.

Without here discussing in detail the constitutionality of BCL §623—we treat that issue in Point III of our brief—it is sufficient to note that, unlike the plight of the young teacher seeking redress in *Lombard,* the Goldbergs' claim, read most charitably, is of the most tenuous sort. Far from depriving the Goldbergs of any rights without notice or hearing, the scheme of BCL §623 afforded them a plenary hearing in an action that they themselves initiated.

In sum, the decision in *Lombard* excepts from the usual rules of *res judicata* only a narrow class of cases, and the plaintiffs' claim here is surely not among them. Rather, cases such as *Taylor* v. *New York City Transit Authority, supra,* control the decision here and bar the maintenance of this action.

III

As the District Court held, BCL §623, as applied to plaintiffs, is plainly constitutional.

We argued in the court below that, apart from the other infirmities of the Goldbergs' case, their claim should be dismissed on the merits, since BCL §623, as applied to them, is plainly valid. Judge Mishler agreed with us and found that "it is quite clear that . . . [§623] does not violate the due process clause of the fourteenth amendment."

As we show below, the District Court's conclusion was surely correct. The Goldbergs' constitutional claim—predicated on the line of procedural due process cases beginning with *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969)—is devoid of merit. Insofar as *Sniadach* and its progeny may be thought to have any relevance to the circumstances here, these decisions support the validity of the §623 statutory scheme. Other authorities, more nearly in point, also establish that the statute, as applied, is a proper exercise of the state's authority. Finally, wholly apart from the precedents, the legislative scheme embodied in §623 assures that dissenting shareholders are deprived of no substantive rights whatever, since, in the event of abandonment of a proposed merger, dissenters, such as the Goldbergs, are thereupon restored to their shareholder status.

(a) BCL §623, as applied to plaintiffs, did not deprive them of procedural due process.

The Goldbergs contend that, when Arrow abandoned its proposed merger, §623, as interpreted by the state courts, "arbitrarily foreclosed plaintiffs from prosecuting their claims for the value of their shares or for the damages they had sustained . . . [by depriving] them of a forum to

be heard and have their claims presented" (appellants' brief, p. 27). The Goldbergs' reliance upon *Sniadach* v. *Fa nce Corp., supra; Fuentes* v. *Shevin,* 407 U.S. 67 similar cases to support this claim is plainly misplac

To b gin with, each of the cases upon which plaintiffs rely concerned deprivations of property as a consequence of acts initiated by someone other than the complaining party. In each instance the constitutional infirmity stemmed from the failure of the state statutory scheme to afford notice or hearing prior to seizure of the complainant's property. Moreover, even *Fuentes,* at its broadest reach, merely

> ". . . enunciated the principle that the constitutional guarantee of procedural due process requires an adversary hearing before an individual may be temporarily deprived of any possessory interest in tangible personal property, however brief the dispossession and however slight his monetary interest in the property." *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 623 (1974) (concurring opinion).

Here, unlike the circumstances in *Sniadach* and *Fuentes,* plaintiffs challenge the validity of a statutory scheme that they themselves voluntarily invoked to obtain a benefit—the right to an appraisal—not available to shareholders at common law. Moreover, the statute that they attack not only affords dissenting shareholders "an adversary hearing," but provides "for judicial control of the process from beginning to end." *Mitchell* v. *W. T. Grant Co., supra.*

Understandably, the Goldbergs omit any mention in their brief of the Supreme Court's decision in *Mitchell,* for that case, at the least, narrows *Fuentes* and, indeed, calls into question its continuing validity.* Surely, in light of

* The four dissenting justices in *Mitchell,* as well as Justice Powell who concurred in the decision, apparently believed that *Mitchell* had effectively overruled *Fuentes* and its predecessors.

Mitchell, plaintiffs' attempt to expand the reach of *Fuentes* to govern the facts at hand is absurd.

As the Court may recall, the *Mitchell* decision upheld a Louisiana procedure that enabled a mortgagee or lien holder to sequester the property of a debtor upon an *ex parte* application and without any pre-seizure hearing. In sustaining the constitutionality of the Louisiana practice, the Court reasoned that an application to a judge (albeit *ex parte*) was required before an order of sequestration could issue and that this, coupled with the debtor's right to an immediate post-seizure hearing, was sufficient to satisfy due process. Hence, concluded the court, the debtor

> "... was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control from beginning to end. This control is one of the measures adopted by the state to minimize the risk that the *ex parte* procedure will lead to a wrongful taking." 416 U.S. at 616-17.

Here, in marked contrast even to the valid Louisiana statute, BCL §623 is replete with provisions for plenary adversary hearings from beginning to end—including the opportunity for the dissenting shareholder to raise in court, prior or subsequent to the commencement of an appraisal proceeding, whatever equitable claims he may have. *E.g., Yoss* v. *Sacks,* 26 App. Div. 2d 671 (2d Dep't 1966); *Newman* v. *Arabol Mfg. Co.,* 41 Misc. 2d 184 (Sup. Ct. Kings Co. 1963).*

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* Numerous other New York cases (*e.g., Eisenberg* v. *Central Zone Property Corp.,* 306 N.Y. 58 (1953); *Williams* v. *Bartell,* 34 Misc. 2d 552 (Sup. Ct. N.Y. Co.), *modified,* 16 App. Div. 2d 21 (1st Dep't 1962)) demonstrate the absurdity of the Goldbergs' contention that, because they were denied an appraisal, they were also denied an opportunity to present their equitable claims for damages. In fact, this is precisely what they did do—vigorously—asserting before both Justices Murtagh and Chimera, the Appellate Division, and the Court of Appeals, that Arrow's actions had been "in bad faith" and hence entitled them to damages. At each turn, the claim was rejected as unsupported by the facts.

Plainly, then, whether one looks to the broad language of *Fuentes,* or to the narrow reading of *Fuentes* by the Supreme Court in *Mitchell,* the Goldbergs' claim of a denial of procedural due process is beside the mark.

Moreover, other recent decisions of both the Supreme Court and the New York Court of Appeals, nowhere discussed by plaintiffs, suggest that the Goldbergs are not even entitled to question the constitutionality of a statutory procedure that they themselves chose to invoke. In *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), the Supreme Court, in rejecting a challenge on due process grounds to the constitutionality of a statutory procedure under the Lloyd-LaFollette Act (providing that a non-probationary employee might be discharged for "cause" but without a pre-removal adversary hearing), first noted that it had "previously viewed skeptically the action of a litigant in challenging the constitutionality of portions of a statute under which it has simultaneously claimed benefits," 416 U.S. at 152-53, and then concluded:

> [W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of . . . [one challenging its constitutionality] must take the bitter with the sweet. 416 U.S. at 153-54.

Similarly, in *Kovarsky* v. *Housing & Development Administration,* 31 N.Y.2d 184 (1972), the New York Court of Appeals rejected a claim that appellants had been denied procedural due process under a statutory scheme that they invoked. Appellants asserted that a provision of the New York City Rent Stabilization Law, under which their landlord had refused to grant them lease renewals, denied them due process, since it made their right to such renewals subject to abrogation by a minority of the tenants. Judge

Jasen pointed out that, prior to passage of the Rent Stabilization Law, tenants possessed no right whatever to renewal of their leases; he reasoned that appellants, therefore, could not complain that their statutory rights were conditioned in various particulars. Hence, he concluded, the Rent Stabilization Law

> "thus, does not arbitrarily limit a more extensive right, but, rather, grants to tenants a limited right which they previously did not have. Appellants, therefore, have no ground for complaint and the statute is by no means unconstitutional." 31 N.Y.2d at 193.

Like the statutes involved in the *Arnett* and *Kovarsky* cases, BCL §623 creates rights in favor of stockholders that they did not previously possess. In short, these cases establish that the Goldbergs, having invoked BCL §623 and having sought its benefits, may not at the same time complain that the statute, as interpreted by the New York courts, conditions their procedural rights in a fashion that they deem detrimental to their interests.

(b) BCL §623, in fact, deprives plaintiffs of n[illegible] substantive rights.

Although plaintiffs' argument is something less than a model of clarity, their challenge to BCL §623 appears to rest upon substantive, as well as procedural, due process grounds. The claim seems to be that, upon abandonment by Arrow of the proposed corporate action from which plaintiffs elected to dissent, BCL §623 neither afforded them the right to payment for their shares nor restored them to precisely the position they had occupied prior to the time of their dissent.

Putting to one side the principles of the *Arnett* and *Kovarsky* cases, an examination of BCL §623 demonstrates

that its provisions assure that dissenting shareholders are not subject to any significant deprivation of rights from the time they dissent until consummation or abandonment of the proposed corporate action.

First, in the event that the corporate action is consummated, BCL §623 entitles a dissenter to payment of an amount equal to the value of his shares at the time the corporate action was approved by stockholders and, in most circumstances, interest as well. On the other hand, in the event the corporate action is abandoned prior to consummation, as happened here, §623(e) provides that the dissenter "shall be reinstated to all his rights as a shareholder as of the filing of his notice of election [to dissent], including any intervening dividend or other distribution . . . ." The same subsection affords a shareholder the further protection of the right unilaterally to withdraw his dissent "at any time before an offer is made by the corporation . . . to pay for his shares," and, even thereafter, authorizes withdrawal of the dissent, if the corporation consents.*

Moreover, contrary to plaintiffs' assertions, dissenting shareholders are not prohibited—by reason of their dissent—from selling their shares prior to the consummation or abandonment of proposed corporation action. Section 623(f) specifically recognizes the right of dissenting shareholders to transfer their stock to others; the only qualification upon this right is the obviously necessary one that purchasers take subject to the benefits and burdens consequent upon the dissent itself. In sum, the statute is drawn with circumspection and, in fact, imposes no signifi-

* The Goldbergs at no time sought to withdraw their election to dissent.

cant deprivation upon dissenters' property rights. As Judge Mishler aptly stated:

> "While plaintiffs would obviously prefer that the statute accord them a vested right of compensation for their shares, the failure of the statute to so provide does not even approach the degree of arbitrary or irrational activity which must be present in order to upset the statute. *See, e.g., Dandridge* v. *Williams,* 397 U.S. 471, 90 S. Ct., 1153 (1970). Instead, it is clear that section 623 is rationally related to a sound and legitimate state interest, *Anderson* v. *International Minerals and Chemical Corp., supra* [295 N.Y. 343 (1946)]."

Conclusion

The judgment of the District Court should be affirmed.

Respectfully submitted,

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March 1, 1975

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Beatrice Harman, being duly sworn, deposes and says:

I am employed by Nickerson, Kramer, Lowenstein, Nessen, Kamin & Soll, attorneys for defendant-appellee in this action. I am not a party to the suit; I am over eighteen years of age; and I reside at 2 Washington Square Village, New York, New York.

On February 28, 1975 I served the within brief for defendant-appellee upon:

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the addresses designated by said attorneys for that purpose, by depositing two true copies of such brief for defendant-appellee in two post-paid, properly addressed wrappers, in an official depository of the United States Post Office within the State of New York.

Beatrice Harman

Sworn to before me
this 28th day of
February, 1975

Geoff M Kalmus

GEOFFREY M. KALMUS
Notary Public, State of New Yor
No. 31-7144854
Qualified in New York County
mmission Expires March 30